BUNGSAR HILL HOLDINGS SDN BHD & ORS v. PENTADBIR TANAH WILAYAH PERSEKUTUAN KUALA LUMPUR & ANOTHER APPEAL

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL APPLICATION NO: S4-15-13-2003;
ORIGINATING SUMMONS NO: S3(S1)-21-90-2001]
2 DECEMBER 2014

LAND LAW: *Acquisition of land – Compulsory acquisition – Compensation paid into court by land administrator – Consent order – Application to release compensation paid into court – Whether Land Acquisition Act 1960 ('LAA') provided powers to court to award interest – Whether pre-judgment interest and post-judgment interest should be awarded – Whether s. 11 of Civil Law Act 1956 ('CLA') could be applied to award pre-judgment interest – Whether registered proprietor had right to post-judgment interest under O. 42 r. 12 of the Rules of Court 2012 ('ROC') – Whether court had jurisdiction to award interest against co-applicant in land reference proceedings – Whether O. 90 r. 6 ROC provided for interest to be paid in respect of money lodged in court*

Bungsar Hill ('the applicant') was the registered proprietor of a piece of land which was compulsorily acquired under the Land Acquisition Act 1960 ('LAA'). Damansara Realty Bhd ('the second applicant') applied to the land administrator ('the respondent') claiming an interest in the land through a lease agreement and required the matter to be referred to the court. The respondent then applied to the court pursuant to s. 29(2) of the LAA for part of the compensation sum to be deposited with the court. Upon the grant of the order, the sums of RM6,856,597.50 and RM802,503.68 were deposited, the former representing 75% of the purchase price while the latter the late payment charges ('S3 Action'). Land reference proceedings were instituted pursuant to s. 38 of the LAA in respect of the amount of compensation awarded by the respondent. A consent order was entered, where an additional compensation of RM425,505 was paid into court ('S4 Action'). It was then settled that the first applicant was the registered proprietor of the relevant land and was entitled to the compensation sum. As such, the first applicant filed two notices of application in the S3 and S4 Actions for the release of the sums paid into court and the application was allowed. The second applicant appealed against the order awarding pre-judgment and post judgment interest on the sums paid into the court on the grounds that (i) the LAA did not provide for the power of the court to award interest to the second applicant and that accordingly any grant of interest by the court would be *ultra vires* of its powers; (ii) the law already provided for interest payable by the Ministry of Finance in respect of amounts paid into court, which implied that there was no further liability for any party to pay additional interest on such amounts paid into court; (iii) no judgment had

been entered against the second applicant in respect of the S3 and A4 Actions, and accordingly, pre-judgment interest and post-judgment interest should not arise; (iv) the second applicant did not receive any of the money that was paid into court, and therefore did not have the use of the money; and; (v) there was no agreement between the parties regarding interest on the money deposited, and that as far as the S4 Action was concerned, because of the consent order the principle of *res judicata* would prohibit the first applicant from claiming costs or interest. Subsequently, the Deputy Registrar awarded costs of RM2500 to the first applicant for each of the applications in respect of the S3 and S4 Actions but dismissed the application for the costs of the proceedings. In turn, the first applicant appealed against this order. The main issue that arose for determination, *inter alia*, was whether the court had jurisdiction to award interest against a co-applicant in respect of a land reference proceedings.

Held:

(1) The High Court had ruled that the provision in the then applicable Rules of the High Court 1980 relating to interest on judgment debts applied by virtue of s. 45(2) of the LAA. Therefore, the proposition put forward by the second applicant that the court did not have the jurisdiction to award interest in the absence of an express provision in the LAA was incorrect. (paras 19 & 20)

(2) Under the LAA, there clearly was a right of a registered proprietor to be paid a compensation sum. Accordingly, post-judgment interest should be recoverable under O. 42 r. 12 of the Rules of Court 2012 ('ROC'), read together with s. 45(2) of the LAA. Section 47(1) of the LAA must be read to mean that a decision must be signed by the assessors only where assessors had been appointed pursuant to s. 40A(2) of the LAA. Where a reference was made to court and that reference did not involve a dispute as to the amount payable, then assessors would not be appointed, however, this did not make the decision of the judge sitting alone any less of a 'judgment' for the purposes of s. 47. Accordingly, any award made pursuant to Part V of the LAA would be considered to be a judgment not only for the purposes of O. 42 r. 12 of the ROC but also s. 11 of the Civil Law Act 1956 ('CLA'). (para 22)

(3) A consent order was granted in the S4 Action by which the parties agreed for the additional sum of RM425,505 to be paid into the court. Although the argument may be made that the parties only intended for the terms of the order to apply to the action conducted, there was nothing in the plain words of the consent order that supported such a construction. Therefore, the first applicant was precluded from claiming costs and interest in respect of the S4 Action. Further, the absence of agreement between the parties regarding interest on the money deposited did not preclude the proper exercise of judicial discretion to award interest. (paras 27, 29 & 30)

(4) Post-judgment interest awarded must be on the judgment debt which comprised the principal sum as well as the pre-judgment interest. The applicable interest rate prescribed in respect of judgment debts by Arahan Amalan Ketua Hakim Negara Bil. 1 Tahun 2012 was 5% per annum. The principles established in the case of *Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim* did not apply to oust the jurisdiction of the court to award interest under the LAA. A second observation was that s. 11 of the CLA, unlike O. 42 r. 12 of the ROC, was not mandatory in nature and instead created a discretion of the court whether or not to award interest. (paras 32 & 35)

(5) Where a person had by his conduct caused a payment that was rightfully due to another person to be delayed, fairness demanded that the person compensated that other person for the opportunity cost incurred by having been kept out of funds. This principle applied not only in respect of pre-judgment interest under s. 11 of the CLA, but also in the case of an award of post-judgment interest pursuant to O. 42 r. 12 of the ROC. (para 43)

(6) The fundamental principle regarding the payment of interest was to compensate the claimant for the loss of use of the funds, regardless of whether the other party had use of the funds for the relevant period. It was only fair that where a person had by his conduct wrongfully kept another out of funds that he be held liable for the consequences of his action. A competing claim to compensation for compulsorily acquired lands was a serious matter and should not be made lightly. A person who disputed the payment of a compensation sum must be prepared to bear the consequences of his actions should a court determine that his claim was without merit. The issue that a claimant genuinely believed that he had a legitimate claim to the compensation sum or to a part of that sum was immaterial. Making a co-claimant responsible for the interest on the compensation sum paid was not only fair for the rightful proprietor of the acquired land but also ensures that claims were not made on the whim of a hopeful but unmeritorious claimant. (para 47)

(7) There was no evidence that the first applicant had applied to the court pursuant to O. 90 r. 6(3) of the ROC for the money to be deposited into an interest bearing account with a licensed financial institution. The interest payable under O. 90 r. 6 of the ROC accrued as of right to the beneficiary of the sum deposited into court. In the present case, the right of the first applicant to the 2% per annum interest remained unaffected by the consent order in the S4 Action. In relation to the S3 Action, interest would be payable on the total sum deposited into court which was RM7,659,101.18. (paras 52, 53 & 59)

(8) The court accordingly ordered that in respect of the S3 Action, the first applicant was to be paid interest on the sum of RM7,659,101.18 at a rate of 2% per annum in accordance with O. 90 r. 6 and 7 of the ROC and

Pekeliling 1/1998. The second applicant was ordered to pay the first applicant pre-judgment interest at a rate of 3% per annum on the principal sum of RM6,856,597.80, post-judgment interest at a rate of 5% per annum on the sum of RM7,659,101.18; and costs of RM40,000 to the first applicant. In respect of the S4 Action, the second applicant was ordered to pay the first applicant interest on the sum of RM425,505 at a rate of 2% per annum in accordance with O. 90 r. 6 and 7 of the ROC and Pekeliling 1/1998. No order as to interest or costs was awarded. (para 64)

Case(s) referred to:

BP Exploration v. Hunt (No. 2) [1983] 2 AC 352 ***(refd)***

Guna Sittampalam v. Sittampalam & Anor v. Aik Hua Properties Sdn Bhd [1989] 2 CLJ 251; [1989] 1 CLJ (Rep) 580 HC ***(refd)***

Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim [2002] 4 CLJ 18 CA ***(dist)***

Renas Development Sdn Bhd v. Pemungut Hasil Tanah, Daerah Timur Laut, Pulau Pinang [1984] 2 CLJ 122; [1984] 2 CLJ (Rep) 447 HC ***(foll)***

The Aldora [1975] QB 748 ***(refd)***

Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd [2003] 4 CLJ 270 HC ***(refd)***

Tuan Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11
Land Acquisition Act 1960, ss. 29(2), 32, 38, 40A(2), 45(2), 47(1), 48
Rules of Court 2012, O. 42 r. 12, O. 56 rr. 1(3A), O. 90 rr. 6(3), 7(3)
Rules of the High Court 1980, O. 42 r. 12
Trade Descriptions Act 1972, s. 16

For the applicant - Alan Gomez (Anita Natalia with him); M/s Tommy Thomas
For the respondent - Richard Lee (Teh Eng Lay & Ong Ing Hou with him); M/s Richard Lee

Reported by Sandra Gabriel

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] This is a cross-appeal against the orders by the Deputy Registrar awarding interest and costs to Bungsar Hill Holdings Sdn Bhd, ("Bungsar Hill"), the registered proprietor of a piece of land located in Damansara Heights that had been compulsorily acquired under the Land Acquisition Act 1960 ("LAA") for the construction of the Sprint expressway in Kuala Lumpur. Damansara Realty Berhad ("Damansara Realty") has appealed against the order of the Deputy Registrar dated 23 September 2013 awarding interest on sums paid into court by the Land Administrator, Pentadbir Tanah

A Wilayah Persekutuan Kuala Lumpur ("the Land Administrator"). Bungsar Hill in turn has appealed against the decisions of the Deputy Registrar dated 7 February 2014 to award costs of RM2,500 for each of the applications and to dismiss the costs of the proceedings.

B **[2]** An important point of law arises in this case, and that is whether a court has the jurisdiction to award interest against a co-applicant in land reference proceedings.

Salient Facts

[3] As mentioned above, Bungsar Hill was the registered proprietor of the C relevant land, which was acquired pursuant to the LAA in December 2000. In May 2001, Damansara Realty applied to the Land Administrator claiming an interest in the land through a lease agreement and requiring the matter to be referred to court. The Land Administrator applied to court pursuant to s. 29(2) of the LAA for 75% of the compensation sum to be deposited with D the court, and subsequent to the grant of the order, the sums of RM6,856,597.50 and RM802,503.68 were deposited, the former representing 75% of the purchase price and the latter the late payment charges. This application, Originating Summons No. S3(S1)-21-90-2001, is referred to as the S3 action.

E **[4]** Land reference proceedings were instituted pursuant to s. 38 of the LAA in respect of the amount of compensation awarded by Land Administrator. A consent order was entered, pursuant to which additional compensation of RM425,505 was paid into court. This application, Civil Application No. S4-15-13-2003, is referred to as the S4 action.

F **[5]** The land reference proceedings were transferred and heard together with Civil Suit No. S6-22-1051-2006 ("the S6 action"), involving a similar dispute between the parties. The outcome of this action was agreed by the parties to be dependent on a separate appeal in Civil Appeal No. W-02-1208-2009. Damansara Realty's appeals to the Court of Appeal and the Federal G Court were dismissed, and accordingly the S6 action was withdrawn by Damansara Realty.

[6] It was then settled that Bungsar Hill was the registered proprietor of the relevant land, and therefore entitled to the compensation sum. Bungsar Hill filed two notices of application on 11 March 2013 in the S3 and S4 H actions for, *inter alia*, the release of the sums paid into court.

[7] On 30 April 2013, the Registrar of this court granted orders in the S3 action and the S4 action for the release to Bungsar Hill of the sums paid into court by the Land Administrator. The sum of RM7,659,101.18 in respect of the S3 action was paid to Bungsar Hill on 21 October 2013, and RM425,505 I in respect of the S4 action on 28 October 2013, in accordance with 30 April 2013 orders.

[8] On 23 September 2013, the Deputy Registrar awarded Bungsar Hill pre-judgment interest of 8% per annum and post-judgment interest of 5% per annum on the sums paid into court by the Land Administrator pursuant to the S3 action and the S4 action. Damansara Realty appealed against this order.

[9] On 7 February 2014, the Deputy Registrar awarded costs of RM2,500 to Bungsar Hill for each of the applications in respect of the S3 and S4 actions, but dismissed the application for the costs of the proceedings. Bungsar Hill appealed against this order.

Issues

[10] Counsels for Damansara Realty argued that:

(a) The LAA does not provide for the power of the court to award interest and that accordingly any grant of interest by the court would be *ultra vires* its powers;

(b) The law already provides for interest payable by the Ministry of Finance in respect of amounts paid into court, which implied that there was no further liability for any party to pay additional interest on such amounts paid into court;

(c) No judgment had been entered against Damansara Realty in respect of the S3 action and the S4 action, and accordingly, pre-judgment interest and post-judgment interest should not arise;

(d) Damansara Realty did not receive any of the money that was paid into court, and therefore did not have the use of the money; and

(e) There was no agreement between the parties regarding interest on the money deposited, and that in as far as the S4 action was concerned, because of the consent order referred to in para. 4 *ante*, the principle of *res judicata* would prohibit the Bungsar Hill from claiming costs or interest.

[11] These issues are addressed in the following paragraphs.

Post-judgment Interest

Jurisdiction Of The Court To Award Interest

[12] Counsel for Damansara Realty rightfully pointed out to this court that the LAA does not specifically provide for any right of a party to land reference proceedings to claim interest on the compensation sum from another person who has made a claim to the Land Administrator in respect of the same piece of land.

[13] The scheme under the LAA does provide for late payment charges at an interest rate of 8% in respect of any amount not paid or deposited by the Land Administrator by the due date. However, there is no provision under

the LAA that entitles interest to be claimed from a claimant who disputes the right of a person to receive compensation or who disputes the manner of apportionment of the compensation.

[14] Counsel for Damansara Realty further argued that, where a right or cause of action did not exist at common law, and is wholly a creature of statute, the only remedies available in respect of any breach of the relevant statutory provision or in respect of such rights or cause of action must be those that have been specifically provided for in the relevant statute. Thus, argued counsel, because the right to compensation following the compulsory acquisition of land is a right that has been created by statute by virtue of the LAA, the universe of available remedies must necessarily only be contained within the four corners of the LAA.

[15] Mr Teh for Damansara Realty cited the case of *Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim*[1] in support of this point. This Court of Appeal decision involves a trade description order granted under the Trade Descriptions Act 1972 in favour of the respondent in the action. The appellant tried to have the trade description order set aside, but failed. It then appealed but later withdrew its appeal. Subsequently, the respondent made an application for assessment of damages and an account of profits, which the High Court allowed. The High Court directed for assessment before the registrar of the court. The appellant appealed to the Court of Appeal, asserting that the High Court ought not have directed the assessment of damages.

[16] Gopal Sri Ram JCA (as he then was), in delivering the judgment of the court, considered s. 16 of the Trade Descriptions Act 1972, which provided for the right of a proprietor or user of a trade mark to apply to the High Court for a trade description order:

> This provision is new. There is no right at common law for a party complaining that his mark or other device or trade description has been infringed to approach the court either *ex parte* or *inter partes* to obtain an order such as that provided by s. 16. Any such complaint to be actionable must satisfy the elements of the well-known tort of passing-off and related torts, such as malicious falsehood. That the remedy provided by s. 16 is novel is made patently clear by Parliament in the preamble of the Act, which in its material part reads:
>
> > An Act to consolidate and amend the laws relating to merchandise marks with **new provisions** prohibiting misdescription of goods ... and for related purposes. (emphasis added)
>
> The present case accordingly falls to be covered by the established principle, which deals with the consequences of Parliament providing novel or new remedy. The principle is ancient. It has been adverted to in numerous cases. We do not propose to go through them all here. Suffice that we mention the seminal cases. Of these the first is *Pasmore v. Oswaldtwistle Urban District Council* [1898] AC 387, where (at p. 394) the Earl of Halsbury LC said:

> The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy or any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

The second is *Wilkinson v. Barking Corporation* [1948] 1 KB 721, where at p. 724, we find Asquith LJ saying this:

> It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others.

These cases have been applied repeatedly by the apex courts of this country. See for example, *Tan Chye Choo & Ors v. Chong Kew Moi* [1970] 1 MLJ 1. See also *Metal Industry Employees Union v. Registrar of Trade Unions & Ors* [1976] 1 MLJ 220.

Applying this settled principle to the present case, it is clear that an applicant moving the court under s. 16 is only entitled to the specific remedy provided by it.

If Parliament had wished to confer jurisdiction upon a court making an order under s. 16 to also award damages, it would had said so expressly. It is therefore plain what Parliament intended was to only criminally punish the infringer of merchandising marks and the perpetrator of any other act or omission specifically proscribed by the Act.

[17] Mr Gomez for Bungsar Hill cited in reply the case of *Renas Development Sdn Bhd v. Pemungut Hasil Tanah, Daerah Timur Laut, Pulau Pinang*[2]. This case involved the LAA and a consent order for payment of an additional sum by way of compensation. Edgar Joseph Jr J (as he then was) held that the consent order was not an award within the meaning of the LAA and that accordingly ss. 32 and 48 of the LAA did not apply, and that O. 42 r. 12 of the Rules of the High Court 1980 applied, entitling the court to award interest from the date of the pronouncement of the consent order until the date of payment of the additional compensation sum.

[18] It has to be noted that the facts of *Renas* are different from the present case. Here the parties are concerned with the issue of interest on sums that had been deposited with the court, whereas *Renas* was concerned with an additional compensation sum that had not yet been paid.

[19] Nonetheless, what is pertinent here is that the High Court had ruled that the provision in the then-applicable Rules of the High Court 1980 relating to interest on judgment debts applied, by virtue of s. 45(2) of the LAA, which provides:

> Save in so far as they may be inconsistent with anything contained in this Act, the law for the time being in force relating to civil procedure shall apply to all proceedings before the Court under this Act.

[20] It follows therefore that the proposition put forward by Mr Teh, which is that this court does not have the jurisdiction to award interest in the absence of an express provision in the LAA, is incorrect.

[21] The distinction that may be made between *Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim* and *Renas* is this: under the Trade Descriptions Act 1972, there is no provision at all for the award of damages to the successful applicant for a trade descriptions order, whereas under the LAA there clearly is a right of a registered proprietor to be paid a compensation sum, and accordingly post-judgment interest should be recoverable under O. 42 r. 12 of the Rules of Court 2012, read together with s. 45(2) of the LAA, on the authority of *Renas*. Therefore the principle enunciated in *Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim* would not apply in the case of the LAA to preclude a party to claim interest on a compensation sum, even though such interest has not been specifically provided for in the LAA.

Whether A Land Reference Award Is A "Judgment" Under Section 11

[22] I now address the interpretation of an "award" for the purposes of s. 47 of the LAA. In my view, s. 47(1) of the LAA must be read to mean that a decision must be signed by the assessors only where assessors have been appointed pursuant to s. 40A(2) of the LAA. Where a reference is made to court and that reference does not involve a dispute as to the amount payable, then assessors will not be appointed, but this does not make the decision of the judge sitting alone any less of a "judgment" for the purposes of s. 47. Accordingly, any award made pursuant to part V of the LAA will be considered to be a judgment not only for the purposes of O. 42 r. 12 of the Rules of Court 2012 but also s. 11 of the Civil Law Act 1956.

Order 42 Rule 12

[23] The specific wordings of O. 42 r. 12 of the Rules of Court 2012 are as follows:

> Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.

[24] Two observations may be made in connection with this rule: first, O. 42 r. 12 makes it mandatory that a judgment debt carries interest for the post-judgment period.

[25] Secondly, O. 42 r. 12 of the Rules of Court 2012 is worded differently from its predecessor provision under the Rules of the High Court 1980. I interpret the words "except when it has otherwise been agreed between the parties" to mean that the mandatory nature of O. 42 r. 12 is displaced where such as agreement exists.

[26] I now consider the effect of the consent order in the S4 action.

The Consent Order In The S4 Action

[27] It will be recalled that a consent order was granted in the S4 action by which the parties agreed for the additional sum of RM425,505 to be paid into court. Paragraph (d) of the consent order of 22 November 2007 stated:

> (d) Tiada perintah mengenai kos dan faedah.

[28] Counsel for Damansara Realty posited that, as a result of this consent order, Bungsar Hill was not entitled to interests or costs in the S4 action. The question is whether the terms of the order was intended to cover the period from the acquisition of the land until the final determination of the dispute, or whether the order applied only with respect to the period between the compulsory acquisition of the land and 22 November 2007 consent order.

[29] This is a matter of the proper construction of the consent order in question. Although the argument may be made that the parties only intended for the terms of the order to apply to the action theretofore conducted, there is nothing in the plain words of the consent order that supports such a construction, and I accordingly hold that Bungsar Hill is precluded from claiming costs and interest in respect of the S4 action.

[30] The submission of counsel for Damansara Realty that there was no agreement between the parties regarding interest on the money deposited need not detain us further except for me to state that the absence of agreement does not preclude the proper exercise of judicial discretion to award interest.

The Amount On Which Post-Judgment Interest Is Payable

[31] Where post-judgment interest is awarded, it must be on the judgment debt, which comprises the principal sum as well as the pre-judgment interest. Abdul Malik Ishak J (as he then was) succinctly explained this point in *Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd*[3]:

> The sum total of it all would be this. That the post-judgment interest on the "judgment debt" ought to be on the total of both the principal sum claimed and also the pre-judgment interest for the following salient reasons:
>
> (1) that both the principal sum claimed and the pre-judgment interest (which represents damages for the period which the plaintiff could not use the principal sum) merged into the judgment debt on 24 June 2002 - and that would be the date of judgment;
>
> (2) that this is prescribed by statute, namely, O. 42 r. 12 of the RHC and that there is no room, at all, for the exercise of discretion by the learned SAR to award post-judgment interest on only the principal sum and not the judgment debt; and
>
> (3) that the award of post-judgment interest on both the principal sum claimed and also the pre-judgment interest are practised in our country as well as in Singapore.

The Applicable Interest Rate

[32] The applicable interest rate prescribed in respect of judgment debts by Arahan Amalan Ketua Hakim Negara Bil. 1 Tahun 2012 is 5% per annum.

[33] The issue of whether such interest is recoverable from a co-applicant in a land reference proceeding (such as Damansara Realty in the present case) is addressed at para. 43, post. I now turn to the issue of pre-judgment interest.

Pre-judgment Interest

[34] Section 11 of the Civil Law Act 1956 empowers the court to award pre-judgment interest. Section 11, so far as it is material for the present purposes, provides as follows:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment

[35] The preliminary point may be made that the analysis in paras. 12 to 21 applies equally in connection with the award of pre-judgment interest under the LAA, and therefore that the principles established in the case of *Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim* do not apply to oust the jurisdiction of this court to award interest under the LAA. A second observation is that s. 11, unlike O. 42 r. 12, is not mandatory in nature, and instead creates a discretion of the court whether or not to award interest.

[36] Counsel for Damansara Realty argued that s. 11 of the Civil Law Act 1956 cannot apply in the present instance, on the basis that:

(a) Section 11 only applies in respect of proceedings for the recovery of any "debt or damages";

(b) There was no debt due to Bungsar Hill from Damansara Realty; and

(c) There was no judgment ordered against Damansara Realty.

Can Interest Be Awarded Against A Co-applicant?

[37] Counsel for Damansara Realty cited the following passage from *Guna Sittampalam v. Sittampalam & Anor v. Aik Hua Properties Sdn Bhd*[4] in support for the proposition that, because the compensation sum was not a debt due from Damansara Realty to Bungsar Hill, s. 11 does not confer on this court the discretion to award pre-judgment interest against Damansara Realty, as a co-applicant in a land reference proceeding:

> The House of Lords has held that the words 'any debt or damages' in s. 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934 'are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a

statute' (such as the UK Law Reform (Frustrated Contracts) Act 1943 in that case: see *BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 2 WLR 253. As s. 11 of our Civil Law Act 1956 is in *pari materia* with the said s. 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934, the words 'any debt or damages' in s. 11 of our Civil Law Act 1956 should also be construed to cover any sum of money which is recoverable by one party from another.

[38] Gunn Chit Tuan J (as His Lordship then was) in Guna Sittampalam cited with approval the decision of the House of Lords in *BP Exploration v. Hunt (No. 2)*[5] where it was held that the expression "debt" was to be construed widely and that accordingly sums paid pursuant to a frustrated contract would bear interest under the provisions of English law that are in pari materia with s. 11 of the Civil Law Act 1956.

[39] Lord Brandon in *BP Exploration* had the occasion to consider the same point in *The Aldora*[6], where it was held that the expression "debt" was wide enough to cover salvage remuneration claim by salvors of a vessel.

[40] All three cases referred to in the preceding paragraphs dealt with sums due from one party to another party and the pre-judgment interest recoverable from the former by the latter. In my view, none of the cases is an authority for the proposition that s. 11 precludes interest being claimed in respect of a debt due from a party in circumstances where the person from whom interest is being claimed was responsible for the delay in the discharge of that debt.

[41] The word "debt" is defined in the *Oxford English Dictionary* as a liability or obligation to pay or render something. This is, in my view, sufficient to encompass the compensation due to be paid to a claimant in a land reference proceeding.

[42] The crux of the issue is this: the plain words of s. 11 do not specify any limit on the identity of the person from whom interest may be claimed.

[43] It is true that, in the vast majority of cases, interest would be claimed from the person from whom a debt is due. Where however, a person has by his conduct caused a payment that was rightfully due to another person to be delayed, fairness demands that the person compensates that other person for the opportunity cost incurred by having been kept out of funds. This principle applies not only in respect of pre-judgment interest under s. 11 of the Civil Law Act 1956, but also in the case of an award of post-judgment interest pursuant to O. 42 r. 12 of the Rules of Court 2012.

[44] Counsel for Damansara Realty cited a number of cases in support of the proposition that, for interest to be awarded, a party must not only have kept the other party out of funds, but must also have had the benefit of the money for the period in respect of which interest is claimed. It suffices for me to mention just one such case:

> The power of the court to award interest on damages is contained in section 11 of the Civil Law Act, 67 of 1956 (see also O. 40, r. 11 of the Supreme Court Rules). This section gives the court power, if it thinks fit, to order that there shall be included in the sum in which judgment is given interest at such rate as it thinks fit on the whole or any part of the damages for the whole or any part of the period (emphasis added) between the date when the cause of action arose and the date of judgment. Therefore, in proceedings for the recovery of damages, the court generally exercises its power so as to include in that sum interest on those damages or on such part of them as it considers appropriate, unless it is satisfied that there are special reasons why no interest should be given. **The basis of an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself**, so he ought to compensate the plaintiff accordingly. Section 11 of the Civil Law Act is, I think, modelled on the provisions of section 3(1) of the (U.K.) Law Reform (Miscellaneous Provisions) Act, 1934, and those provisions have been judicially considered in a number of cases, where the courts have laid down certain guide lines (see, for example, *Jefford v. Gee* [1970] 1 All ER 1202).[7]

[45] Counsel for Bungsar Hill on the other hand, also quoted a number of cases where the element of benefit was not specified in the *dicta*, an example of which follows:

> Pre-trial interest is allowed by law to be claimed by the appellant. This is specified in s. 11 of the Civil Law Act 1956 as well as in judicial pronouncements - see *Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd* [2003] 4 MLJ 30; *Lee Guan Par v. Hotel Universal Sdn Bhd* [2005] 4 MLJ 589. The objective of this is to compensate the plaintiff for the loss of use of the money which the defendant had kept him out of it from the time when he ought to be paid. Though the word 'tried' is used in s. 11 of the Civil Law Act 1956, it is my humble opinion that this should be given a broad interpretation to include any order made by the court, be it judicially made or done administratively (as described in the White Book).[8]

[46] In my view, the fundamental principle regarding the payment of interest is to compensate the claimant for the loss of use of the funds, regardless of whether the other party had use of the funds for the relevant period. It is only fair that where a person has by his conduct wrongfully kept another out of funds that he be held liable for the consequences of his action.

[47] The imposition of interest can also be justified from a policy perspective: a competing claim to compensation for compulsorily acquired lands is a serious matter and should not be made lightly. A person who disputes the payment of a compensation sum must be prepared to bear the consequences of his actions should a court determine that his claim is without merit. That a claimant genuinely believed that he had a legitimate claim to the compensation sum or to a part of that sum is immaterial. Making a

co-claimant responsible for the interest on the compensation sum paid is not only fair for the rightful proprietor of the acquired land but also ensures that claims are not made on the whim of a hopeful but unmeritorious claimant.

[48] To summarise the issues thus far, I find that:

(a) This court does indeed have the jurisdiction to award both pre-judgment and post-judgment interest in respect of a compensation sum awarded under the LAA;

(b) The court's discretion may properly be exercised to award interest on sums paid into court by the Land Administrator against a co-claimant in a land reference proceeding, notwithstanding that the co-claimant did not have the use of the money for the relevant period;

(c) On a proper construction of the consent order in the S4 action, the term of the order on costs and interest precludes Bungsar Hill from claiming costs and interest in that action.

Order 90 r. 6 Of The Rules of Court 2012

[49] Order 90 r. 6 of the Rules of Court 2012 provides for interest to be paid in respect of money lodged in court. An interest rate of 2% per annum has been prescribed pursuant to Pekeliling Ketua Pendaftar Bil. 1 Tahun 1998 (Pekeliling 1/1998).

[50] Accordingly, Bungsar Hill ought to have received interest of 2% per annum in respect of sums that had been paid into court. However, the affidavit evidence before this court indicated that such interest had not been paid to Bungsar Hill.

[51] The appeals before me from the orders granted by the Registrars in the S3 action and the S4 action have been made pursuant to O. 56 of the Rules of Court 2012. Any such appeal to a judge in chambers from a decision of a Registrar is, of course, by way of a rehearing (see for example *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [9]), and I am to exercise my discretion as though the matter has come before me for the first time. In the course of submissions, I allowed Bungsar Hill to file an additional affidavit to put before this court evidence whether the 2% per annum interest had been paid in accordance with Pekeliling 1/1998. This evidence obviously would not have been available at the time the orders of 30 April 2013 and 23 September 2013 were made, as the sums had not yet been released from the court at that time. Hence, in my view, the strictures of O. 56 r. 1(3A) of the Rules of Court 2012 have been complied with. To ameliorate any unfairness that may arise from any unrebutted averments in this additional affidavit, I also permitted Damansara Realty to file an affidavit in response.

[52] Where a sum of money has been deposited into court, a party may apply to court for the money to be deposited into an interest bearing account with a licensed financial institution. This is provided for in O. 90 r. 6(3):

> (3) Nothing in these Rules shall affect the right of parties to the action from applying to the Court for the money lodged in Court to be deposited in an interest bearing account with any licensed bank or financial institution in Malaysia.

[53] There is no evidence before this court that such an application was made. If such an application had been made, Bungsar Hill would have received compounded interest at an average rate of approximately 3% per annum, based on the evidence provided to this court on the deposit rates of licensed commercial banks published by Bank Negara Malaysia, depending on the selected tenure of the deposit.

[54] In *Renas*, the High Court determined the applicable rate of interest by reference to the rate prescribed in s. 48 of the LAA (which at that time was 6%). I see no reason to depart from this principle, save and except that the interest rate in the present instance should be adjusted downwards to 3% per annum take into account the following:

(a) Order 90 r. 6(3). Had Bungsar Hill applied under O. 90 r. 6(3) for the compensation sums to be paid into court, it would have received a higher sum as outlined in the preceding two paragraphs; and

(b) Delay by Bungsar Hill. The order of the Federal Court referred to in para. 5 *ante* dismissing the appeal by Damansara Realty was dated 11 October 2011. Accordingly, Bungsar Hill ought to have applied for the release of the compensation sums immediately thereafter. It did not. The notice of application was only filed on 11 March 2013. Accordingly, Damansara Realty ought not be liable for pre-judgment interest for the period between 12 October 2011 to 11 March 2013;

[55] After deducting the following from the interest amount on the compensation sum at the rate of 8% per annum (applicable by analogy to s. 48 of the LAA):

(a) The approximate compounded interest Bungsar Hill would have received had it applied for the compensation sum to be placed on deposit with a licensed commercial bank; and

(b) Interest for the approximate period of one and a half years for which I have held Bungsar Hill to be disentitled to interest on account of its delay,

I have determined the implied (non-compounded) interest rate for the relevant period to be 3%.

Time From Which Interest Runs

[56] On the principle that interest is awarded to compensate a claimant for loss of use of money, the interest payable by Damansara Realty should run from the time at which the compensation sum would have otherwise been paid to Bungsar Hill, but for the claim made by Damansara Realty, which had resulted in the sum being paid into court instead.

[57] In respect of the S3 action, this date was 10 July 2002.

Interest Payable By The Court

[58] As the nature of this appeal is a rehearing, it is open to me to supplement the orders of the Registrar of 30 April 2013 by ordering that interest at a rate of 2% per annum be paid to Bungsar Hill in respect of the sums deposited into court in the S3 action and the S4 action.

[59] In my view, the interest payable under O. 90 r. 6 of the Rules of Court 2012 accrues as of right to the beneficiary of the sum deposited into court. In the present case the right of Bungsar Hill to the 2% per annum interest remains unaffected by the consent order in the S4 action.

[60] Order 90 r. 6 provides that "money lodged in court to the credit of any account shall be deemed to be placed on deposit, and shall be credited with interest". No distinction is made between interest and principal (unlike s. 11 of the Civil Law Act 1956). Accordingly, in relation to the S3 action, interest would be payable on the total sum deposited into court, which is RM7,659,101.18.

[61] Order 90 r. 7 provides for the manner in which interest is to be calculated in respect of sums deposited into court. Sub-rule (3) provides:

> Such interest begins on the first day of the calendar month next succeeding that in which the money is placed on deposit, and ceases from the last day of the calendar month next preceding the day of the withdrawal of the money from deposit.

[62] In respect of the S3 action, the Land Administrator forwarded a cheque to the court on 8 July 2002, which was received by the court on 10 July 2002 and for which a receipt was issued on 15 July 2002. The compensation sum was paid out by the court to Bungsar Hill on 21 October 2013. Applying O. 90 r. 7(3): interest of 2% per annum payable by the accountant general shall therefore run from 1 August 2002 (being the first calendar day of the month following the deposit of the money) until 30 September 2013 (being the last calendar day of the month preceding the month in which payment was made).

[63] In relation to the S4 action, a receipt was issued by the court for the additional compensation sum on 17 January 2008. This sum was paid out by the court to Bungsar Hill on 28 October 2013. Accordingly, the accountant

general is to pay interest of 2% per annum on the amount deposited into court in respect of the S4 action beginning from 1 February 2008 until 30 September 2013.

Orders

[64] For the reasons set out above and having today heard submissions of counsels on costs, I order:

(a) In respect of the S3 action:

(i) That Bungsar Hill be paid interest on the sum of RM7,659,101.18 at a rate of 2% per annum pursuant to and in accordance with O. 90 rr. 6 and 7 of the Rules of Court 2012 and Pekeliling 1/1998;

(ii) That Damansara Realty pays to Bungsar Hill:

(1) Pre-judgment interest at a rate of 3% per annum on the principal sum of RM6,856,597.80 from 10 July 2002 to 30 April 2013;

(2) Post-judgment interest at a rate of 5% per annum on the sum of RM7,659,101.18 from 1 May 2013 to 21 October 2013; and

(iii) That Damansara Realty pays costs of RM40,000 to Bungsar Hill; and

(b) In respect of the S4 action:

(i) That Bungsar Hill be paid interest on the sum of RM425,505 at a rate of 2% per annum pursuant to and in accordance with O. 90 rr. 6 and 7 of the Rules of Court 2012 and Pekeliling 1/1998; and

(ii) That there be no order as to interest or costs.

Endnotes:

1. [2002] 4 CLJ 18
2. [1984] 2 CLJ 122; [1984] 2 CLJ (Rep) 447; [1985] 1 MLJ 248
3. [2003] 4 CLJ 270; [2003] 4 MLJ 30
4. [1989] 2 CLJ 251; [1989] 1 CLJ (Rep) 580; [1989] 2 MLJ 162
5. [1983] 2 AC 352
6. [1975] QB 748
7. *Lim Kar Bee v. Abdul Latif Ismail* [1978] 1 MLJ 109, per Raja Azlan Shah FJ
8. *Mirra Sdn Bhd v. The Ayer Molek Rubber Company Bhd* [2008] 2 MLJ 348, per James Foong JCA
9. [1996] 1 CLJ 241, [1996] 1 MLJ 30